SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1970

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

No. 585

COOPER AGENCY, PETITIONER,

versus

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

HENRY H. EDENS,
1219 Main Street,
Columbia, South Carolina,
29201,
Counsel for Petitioner.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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ARGUMENT IN REPLY

The brief for the United States in opposition, like the order for judgment in the District Court, is based upon an erroneous statement of decisive facts.

If it were true, as stated in said order (Pet. App. 24) and on page 3 of said brief, that the Commissioner of Internal Revenue had determined that the petitioner owed the Government $1,412,522.58, plus interest, or a total of $1,795,466.63 as of November 24, 1965, then the Government would have correctly concluded that petitioner's payment

of $1,192,405.43 was a legal compromise which was authorized under Section 7122(a) of the Internal Revenue Code of 1954.

In truth, however; as shown by official Internal Revenue Service records in evidence and Government admissions in the District Court, the petitioner was never determined to owe any more than $463,118.55, plus interest; in fact, the Commissioner of Internal Revenue determined and officially notified the petitioner that "inasmuch as the value of assets received by you amounted to $2,340.00 and $460,778.55, your liability as a transferee is limited to $463,118.55, plus interest as provided by law." (Pet. 4.)

Clearly, petitioner's payment of $1,192,405.43 was not a legal compromise, but was an illegal exaction of approximately twice the maximum amount which petitioner could have possibly owed, even if all, instead of none, of the Internal Revenue Commissioner's determinations of the petitioner's liability had been correct. (Pet. 6.)

NEW MATTER UNAVAILABLE WHEN PETITION WAS FILED

On September 8, 1970, after the petition was filed in this Court, the petitioner served and filed in the District Court for South Carolina a notice of motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. At the same time, the petitioner served and filed the request for admissions printed below; the Government has filed no response to this request, and the facts stated therein are deemed admitted under Rule 36 of the Federal Rules of Civil Procedure:

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Columbia Division

CIVIL ACTION NO. 68-533

COOPER AGENCY, PLAINTIFF,

versus

UNITED STATES OF AMERICA, DEFENDANT

PLAINTIFF'S REQUEST FOR ADMISSIONS BY DEFENDANT

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, the plaintiff hereby requests the defendant, within ten days after service hereof, to admit each of the facts stated below and shown to be true by official records of the Internal Revenue Service.

Relative to determinations made by the Commissioner of Internal Revenue, under Section 6901 of the Internal Revenue Code, that the plaintiff was liable as a transferee of assets received from other taxpayers as transferors:

(1) The amount of $1,412,522.58, plus interest, represented claims against transferors;

(2) All transferred assets received by the plaintiff at any time had total value of $463,118.55;

(3) Claims against transferors exceeded the total value of all transferred assets by the amount of $949,404.03, plus interest, for which the plaintiff was never determined to be liable as transferee or otherwise.

CHARLES F. COOPER,
Attorney for Plaintiff.

September 8, 1970.

CONCLUSION

In the light of the foregoing, this Court is respectfully urged to grant the petition for writ of certiorari; indeed, petitioner respectfully suggests that summary reversal is now in order.

Respectfully submitted,

HENRY H. EDENS,
1219 Main Street,
Columbia, South Carolina,
29201,
Counsel for Petitioner.

October ..., 1970.

APPENDIX

APPLICABLE RULES OF CIVIL PROCEDURE IN DISTRICT COURT

RULE 36

Admission of Facts and of Genuineness of Documents

(a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested **shall be deemed admitted** unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

RULE 60

Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis*, *coram vobis*, *audita querla*, and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 1970, three copies of Petitioner's Reply and Supplemental Brief were mailed, postage prepaid, to each of the following: Erwin N. Griswold, Esquire, Solicitor General, Department of Justice, Washington, D. C. 20530, and Johnnie M. Walters, Esquire, Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.

/s/ HENRY H. EDENS,
1219 Main Street,
Columbia, South Carolina
29201,
Counsel for Petitioner.